Supreme Court, U.S.
FILED
JUL 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1897

(4)

IN THE

# Supreme Court of the United States

October Term, 1987

FREDRIC HABERMAN, *et al.*,

*Appellants,*

*v.*

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

*Appellees.*

On Appeal from the Supreme Court of Washington

## COLUMBIA APPELLEES' MOTION TO DISMISS THE APPEAL

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July 18, 1988

ABCD Legal Printers, Seattle, WA

This Motion to Dismiss is submitted on behalf of the following appellees, which for convenience are referred to collectively as the "Columbia Appellees" or "these appellees":

Columbia Rural Electric Association, Inc.

Blachly-Lane County Cooperative Electric Association

Columbia Basin Electric Cooperative, Inc.

Consumers Power, Inc.

Coos-Curry Electric Cooperative, Inc.

Douglas Electric Cooperative, Inc.

Hood River Electric Cooperative

Inland Power & Light Company

Lane Electric Cooperative, Inc.

Midstate Electric Cooperative, Inc.

Salem Electric

Umatilla Electric Cooperative Association

Wasco Electric Cooperative, Inc.

Kootenai Electric Cooperative, Inc.

Fall River Rural Electric Cooperative, Inc.

Lost River Electric Cooperative, Inc.

Raft River Rural Electric Cooperative, Inc.

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## INTRODUCTION

This Motion to Dismiss is brought by the seventeen rural electric cooperatives listed on the inside front cover, referred to collectively herein as the "Columbia Appellees." These appellees were defendants in the state court proceedings. Two appeals were filed in this case, one by a group of plaintiffs led by Fredric Haberman (hereinafter "the Haberman appellants" or simply "Haberman") and the other by a group of intervenors led by American Express Travel Related Services Company, Inc. (hereinafter "the American Express appellants" or simply "American Express").[1] The Columbia Appellees

[1] A cross-appeal was also filed by defendant Wood Dawson Smith & Hellman.

move to dismiss both appeals, in whole or in part, on the following grounds:

1. Pursuant to Rule 16.1(a), the Columbia Appellees move to dismiss both appeals as not within this Court's jurisdiction, because the decision appealed from is not a final judgment, and to dismiss the Commerce Clause and Equal Protection issues raised by the American Express appellants as not within this Court's jurisdiction, because American Express has no standing to raise these issues.

2. Pursuant to Rule 16.1(b), the Columbia Appellees move to dismiss all the issues raised by both Haberman and American Express for want of a substantial federal question and to dismiss the Commerce Clause and Equal Protection issues raised by American Express, because they were not expressly passed on and the state court's ruling that American Express lacks standing to raise those issues rests on an adequate non-federal basis.

3. Pursuant to Rule 16.1(d), the Columbia Appellees move to dismiss these appeals for prudential reasons, because appellants have failed to present this Court with all issues, regarding the constitutionality of the state statute, which they are pursuing and have stated their intention to continue to pursue in this and related litigation.

Only those grounds which apply to this appeal filed by Haberman are discussed in this motion. Additional grounds for dismissal are discussed in the parallel Motion to Dismiss being filed by the Columbia Appellees in Appeal No. 87-1889, brought by American Express.

## STATEMENT OF THE CASE

This state securities fraud litigation is one of several pending cases arising from the sale of bonds, from 1977 to 1981, by the Washington Public Power Supply System to finance construction of two nuclear power plants. Construction of the plants was terminated prior to completion on January 22, 1982, and the Supply System was declared in default on the bonds in the summer of 1983. Prior to default, Chemical Bank, acting on behalf of all bondholders as Bond Fund Trustee, had sued in state court to enforce contracts, known as the "Participants' Agreements," between the Supply System and 88 public utilities, municipalities and rural electric cooperatives. Pursuant to the Participants' Agreements, the utilities, municipalities and cooperatives, which are referred to collectively as the "participants," agreed to purchase shares of the output of the two plants. On June 15, 1983, the Supreme Court of Washington issued a decision holding that the Participants' Agreements between the Supply System and the Washington public utilities and municipalities were *ultra vires* and void. *Chemical Bank v. Washington Public Power Supply System*, 99 Wash. 2d 772, 666 P.2d 329 (1983), *cert. denied*, 471 U.S. 1075 (1985). Subsequently, the Washington court ruled that the Participants' Agreements between the Supply System and the rural electric cooperatives and non-Washington public utilities and municipalities were also unenforceable due to commercial frustration and mutual mistake. *Chemical Bank v. Washington Public Power Supply System*, 102 Wash. 2d 874, 691 P.2d 524 (1984), *cert. denied*, 471 U.S. 1075 (1985). These rulings eliminated any contractual claims the bondholders may have had against any party herein except the Supply System itself.

During the spring and summer of 1983, numerous securities fraud actions were filed in the federal district courts against the Supply System, its members and directors, its

professional consultants and underwriters, the 88 participant utilities, and various other parties. These suits were consolidated for pretrial proceedings in the Western District of Washington as *In re Washington Public Power Supply System Securities Litigation*, MDL No. 551, and plaintiff classes were eventually certified on federal and state securities fraud claims. The appellants herein are members of the plaintiff classes in MDL No. 551. Trial of that litigation is scheduled to commence on September 7, 1988.

Although not opting out of the MDL No. 551 class action, the Haberman appellants, who have filed this appeal, commenced this action in the Superior Court of Washington on May 7, 1984, alleging primarily violations of the Washington State Securities Act (hereinafter "WSSA"). In March 1985 the American Express appellants, who have filed Appeal No. 87-1889, intervened in that action and alleged additional claims for common law fraud and negligent misrepresentation. The defendants, appellees in this Court except for cross-appellant Wood Dawson Smith & Hellman (hereinafter "Wood Dawson"), included the Supply System, its members, its professional consultants, the participants, and Chemical Bank.[2] Among other things, the appellants alleged that the appellees were liable under the WSSA for negligently failing to disclose material facts.

The Washington State Securities Act does not specify whether scienter must be proved to establish liability. Relying on a provision that the law be interpreted in coordination with related federal regulation, the Washington courts at first indicated that proof of scienter was not necessary to establish liability, in line with the prevailing federal court interpretation

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[2] The Columbia Appellees adopt the appellants' list of parties and state, for purposes of Rule 23.1, that they are rural electric cooperatives located in Washington, Oregon and Idaho and have no parent companies, subsidiaries or affiliates.

of Rule 10b-5. *See Shermer v. Baker*, 2 Wash. App. 845, 472 P.2d 589 (1970). However, in 1977, after this Court had ruled in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), that scienter was a necessary element of the federal cause of action, the Washington Court of Appeals held that scienter was also a prerequisite to liability under the WSSA. *Ludwig v. Mutual Real Estate Investors*, 18 Wash. App. 33, 567 P.2d 658 (1977). This remained the rule in Washington until the Supreme Court of Washington overruled *Ludwig* on March 20, 1980. *Kittilson v. Ford*, 93 Wash. 2d 223, 608 P.2d 264 (1980). In 1981, the Washington Legislature amended the WSSA to provide that scienter must be proved in cases involving securities issued by the state or its agencies. 1981 Wash. Laws 1138 (codified as amended at Wash. Rev. Code § 21.20.430(7)). In April 1985, the Washington legislature modified this amendment to the WSSA, through passage of what is known as the Scienter Amendment, S. 4114, to require additionally proof of scienter in claims made under the Act involving securities issued by Washington municipal or quasi-municipal corporations. 1985 Wash. Laws 642 (codified as amended at Wash. Rev. Code § 21.20.430(7)).[3]

On October 7, 1985, the Washington trial court dismissed all of appellants' claims in this action based in part on the Scienter Amendment, which it found constitutional and retroactive in application. The Supreme Court of Washington accepted appellants' direct appeal of this ruling. However, while the appeal was pending, the federal district court in MDL No. 551 ruled that the Scienter Amendment was *not* retroactive, absent an express provision making it so, and therefore was not applicable to the class plaintiffs' state law claims.[4]

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[3] Proof of scienter, however, was specifically *not* required for claims against bond counsel and bond underwriters.

[4] The appellants herein were excluded from this ruling under the doctrine of *res judicata*.

*In re Washington Public Power Supply System Securities Litigation*, [1986-1987 Transfer Binder] Blue Sky L.Rep. (CCH) ¶ 72,371, at 71,678 (W.D. Wash. January 24, 1986).

Following this ruling, the Washington legislature again modified the WSSA with passage of what is known as the Retroactivity Amendment, S. 3990. This amendment added an express provision making application of the Scienter Amendment retroactive. 1986 Wash. Laws 1354 (codified at Wash. Rev. Code § 21.20.430(7)). The federal district court in MDL No. 551 then ruled that this Retroactivity Amendment was unconstitutional under the principle of separation of powers. *In Re Washington Public Power Supply System Securities Litigation*, 673 F.Supp. 411, 417 (W.D. Wash. 1987).

On October 8, 1987, the Supreme Court of Washington issued the decision from which this appeal is taken. The court reversed the dismissal of appellants' claims under the WSSA and remanded the case for trial. However, the court upheld the constitutionality of the Scienter and Retroactivity Amendments. *Haberman v. Washington Public Power Supply System*, 109 Wash. 2d 107, 744 P.2d 1032 (1987), *modified*, 750 P.2d 254 (Wash. 1988).

Two appeals have been filed in this Court pursuant to 28 U.S.C. § 1257(2). In this appeal, the *Haberman* appellants assert that the Scienter and Retroactivity Amendments violate the Contracts Clause of the United States Constitution and join the separate jurisdictional statement filed by the American Express appellants. In Appeal No. 87-1889, the American Express appellants assert that the Scienter and Retroactivity Amendments violate the Commerce Clause, Due Process Clause and Fourteenth Amendment of the Constitution. Notably, neither group of appellants has asserted that the Washington court erred in finding that the amendments did not violate the principle of separation of powers, the one ground upon which the federal district court had ruled in their favor.

After the filing of appellants' jurisdictional statements with this Court, the federal district court in MDL No. 551 reversed its ruling on the constitutionality of the Scienter and Retroactivity Amendments. In a minute order entered June 13, 1988, the district court granted a defense motion to reconsider its prior ruling. In its written opinion issued on July 14, 1988, the district court acknowledged that, contrary to its prior ruling, the federal separation of powers principal does not apply as between a federal court and a state legislature. Thus, the federal district court and the Supreme Court of Washington are now in agreement in upholding the constitutionality of the Scienter and Retroactivity Amendments.

## ARGUMENT

### I. This Appeal Should Be Dimissed As Not Within This Court's Jurisdiction, Because The Decision Appealed From Is Not A Final Judgment.

This appeal should be dismissed as not within this Court's jurisdiction, because the decision appealed from is not a final judgment appealable pursuant to 28 U.S.C. § 1257(2). This litigation was not terminated by the decision of the Supreme Court of Washington, but was remanded for trial on the merits. Contrary to appellants' contentions, this case does not fit any of the four categories of exceptions to the finality requirement recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The first two categories do not apply, because the issues raised here will be mooted if appellants prevail on the merits of their WSSA claims by proving scienter in later state court proceedings.[5] As this Court explained in *Cox*

[5] The issues will also be mooted if judgment, following trial or by settlement, is entered in favor of the plaintiff classes in MDL No. 551, which judgment would be *res judicata* on appellants' state law claims in this action.

*Broadcasting*, the first two categories only apply where the federal issue will *not* be mooted:

> In the cases in the first two categories considered below, the federal issue would *not be mooted or otherwise affected by proceedings yet to be had* because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question. In the other two categories, however, the federal issue would be mooted if the petitioner or appellant seeking to bring the action here prevailed on the merits in the later state court proceedings, but there is nevertheless sufficient justification for immediate review of the federal question determined in the state courts.

420 U.S. at 478-79 (emphasis added).

The last two categories also do not apply to this case. The third category does not apply, because later review of the federal issue is not barred under state law. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 481. The fourth category does not apply, because reversal of the state court's ruling on the constitutionality of the Scienter and Retroactivity Amendments will not preclude further litigation. It would simply change the nature and character of the state proceedings by allowing appellants to recover upon proof that appellees negligently, rather than intentionally or recklessly, made representations in violation of the Act. As this Court explained in *Cox Broadcasting*, the fourth category applies only where reversal of the state court on the federal issue would preclude further litigation on the relevant cause of action:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, *and where reversal of the state court on the federal issue would be preclusive of any further*

> litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-83 (emphasis added).

Since the decision of the Supreme Court of Washington is not a final judgment and does not meet any of the exceptions to the finality requirement, this appeal is not properly brought under 28 U.S.C. § 1257(2) and should be dismissed as not within this Court's jurisdiction.

## II. This Appeal Should Be Dismissed For Want Of A Substantial Federal Question

This Court should dismiss this appeal without oral argument, because the issue raised concerning the constitutionality of the Scienter and Retroactivity Amendments does not present a substantial federal question. In support of this argument the Columbia Appellees rely on the reasoning of the Supreme Court of Washington set forth in the decision appealed from.[6]

## III. This Appeal Should Be Dismissed For Prudential Reasons

This appeal should be dismissed for prudential reasons, because the appellants have failed to bring before this Court

[6] The insubstantiality of appellants' argument is highlighted by the fact that at the time most of the bonds were sold, Washington law required proof of scienter as a prerequisite to recovery under the WSSA. *Ludwig v. Mutual Real Estate Investors*, 18 Wash.App. 33, 567 P.2d 658 (1977).

all grounds upon which they actively contend the Scienter and Retroactivity Amendments are unconstitutional. In a sense, the appellants are seeking only an advisory opinion of this Court on whether the state statutory amendments are constitutionally valid based upon the grounds stated in their Jurisdictional Statement. Regardless of this Court's affirmation of the constitutionality of the amendments, the appellants have indicated they will continue to argue in the related federal court litigation that the amendments are unconstitutional under the separation of powers doctrine.

Although the Supreme Court of Washington squarely addressed and rejected the separation of powers argument, appellants have failed to raise it on this appeal, not because they accept the state court's ruling as correct, but to avoid being bound by this Court's affirmance on that issue. In footnote 8 on page 11 of the Jurisdictional Statement in Appeal No. 87-1889, in which the Haberman appellants have expressly joined, appellants state that they do not believe the Washington court's ruling on the constitutionality of the Scienter and Retroactivity Amendments should act as *res judicata* to bar them from challenging the statute in the parallel federal securities litigation. At the time these appeals were docketed, the district judge in the federal litigation had ruled that the amendments were unconstitutional based on the principle of separation of powers. Appellants here seek review of only some issues addressed by the state court in order to preserve other issues, such as the separation of powers argument, for later appeal, if necessary, in the federal litigation.

Rule 16.1(d) provides that an appellee may move to dismiss an appeal for any reason. Columbia Appellees suggest that this Court should not set oral argument on this appeal due to appellants' attempts to split and manipulate the issues and their unwillingness to seek a complete and final adjudication by this Court on the constitutionality of the Scienter and Retroactivity Amendments.

## CONCLUSION

This Court should dismiss this appeal for lack of jurisdiction, for failure to present a substantial federal question, and for prudential reasons due to appellants' failure to seek a complete adjudication by this Court of the constitutionality of the challenged state statute.

Respectfully submitted,

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